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TO: Deputy Chief Greg Hestness
Deputy Chief Bill Jones

FROM: Dana Banwer, ^{DB} Assistant City Attorney

DATE: May 21, 1997

RE: Police Service for Special Events

MEMORANDUM

You have asked whether the Minneapolis Police Department may provide police protection, at no charge to the event sponsor for some events and not for others. This issue arises in the context of the annual Block Party which is sponsored by the Downtown Council, which has received police protection from the Police Department at no charge. In the past, the Police Reservists provided some of the protection for the Block Party. In 1996 the Reservists refused to continue this service due to the unruliness of the crowd attracted by the Block Party event. You have estimated that the cost to the City of providing police service to the Block Party in 1996 was approximately \$30,000.

It is also my understanding that other events held within the city (which, like the Block Party are for-profit events), such as Cedarfest, the Uptown Art Fair, Lyn-Lake Festival, and the Gay and Lesbian Pride Festival provide their own security at their expense for the event. In addition to the events noted above, certain not-for-profit events receive little or scant extra police services. Such events include pow wows, Juneteenth, and other marches and parades.

Two constitutional issues, freedom of speech and equal protection, are raised by this inquiry. The issues are discussed below. This discussion is intended to provide the Department with parameters in determining a policy for establishing fees for event permits.

EQUAL PROTECTION

The first issue raised by the Block Party situation is one of equal protection. An equal protection issue may arise where a governmental agency has a discriminatory policy or discriminatory enforcement of a regulation or policy. If, for example, the city has a system in place which provides for

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the city absorbing the police costs of certain events and not others, this policy may be considered discriminatory. In the event that such a policy is challenged in court on equal protection grounds, the policy would be analyzed under one of three tests: strict scrutiny, intermediate scrutiny, or rational basis. The determination as to which test to apply depends on who the plaintiff is.

Unless a statute, [ordinance or policy] provokes "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class", it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose. Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 108 S. Ct. 2481 (1988). Classifications not involving a suspect class or a fundamental right are presumed constitutional; "states are accorded wide latitude in regulation of their local economies under their police powers and rational distinctions may be drawn with substantially less than mathematical exactitude". McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408-1409, 22 L.Ed. 2d 739 (1969).

Thus the first step in analyzing whether the Department may charge a police service fee to some event sponsors and not to others, is to determine whether the policy affects a fundamental right or a suspect class. With respect to events such as the Block Party, Cedarfest, the Uptown Art Fair, and the Lyn-Lake festival, clearly, these events are purely recreational and/or commercial events, not involving fundamental rights or suspect classes. In these instances, a police service fee policy would be evaluated under a rational basis test, and will most likely be upheld if the policy is rationally related to a legitimate governmental purpose. A legitimate governmental purpose includes protecting the public coffers by requiring event sponsors who most use police resources to pay a fee for police services, while foregoing fees from those sponsors whose use of police resources is more limited.

A "heightened" or "intermediate" standard of review, which is less demanding than strict scrutiny, but more demanding than the rational basis standard, is generally applied only in cases that involve discriminatory classifications based on sex or illegitimacy. Kadrmas, at 459.

FIRST AMENDMENT

A First Amendment issue arises in the context of an event which is protected by the First Amendment, such as an assembly or a march involving a political

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issue. Typically, issues such as anti-abortion or pro-abortion rallies and marches, and anti-nuclear demonstrations are the types of events which would fall into the "protected speech" category.

In general, a municipality may charge sponsors of events fees for police services at events which include activity on public property for which police services are needed to maintain public order. Cox v. State of New Hampshire, 312 U.S. 569, 577 (1941). A fee may be charged for the expenses incurred by the municipality for policing the event. Such a fee is not "contrary to the Constitution in the charge of a fee limited to the purpose stated." *Id.* A flat fee to all sponsors is not required, and as long as the varying fees are applied to the sponsors in a non-discriminatory manner, the fee does not violate the First Amendment.

A fee which is related to the cost of police services does not abridge the First Amendment protections as long as the fee is content-neutral. Stonewall Union v. City of Columbus, 931 F. 2d 1130, 1135 (1991). The requirement that a fee for such services be content-neutral, stems from the fact that such a fee, on its face, constitutes a prior restraint of the First Amendment guarantees which allow citizens to use the public streets for a variety of events. A fee which relates to traffic control, and which does not give unfettered discretion to the licensing authority will be upheld. *Id.* A licensing authority may consider objective factors including "time, date, route, length, number of participants and vehicles." *Id.* Moreover, the fees must be applied with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. Cox, supra, at 576.

In Orlando, Florida, a city ordinance required the chief of police to "determine whether and to what extent additional police protection reasonably will be required for purposes of traffic and crowd control" before a permit would be issued. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F. 2d 1515, 1517 (1985). In determining whether additional police protection was required, the ordinance required the police chief to consider such factors as the size, location and nature of the assembly and if additional police protection was then warranted, in the police chief's estimation, the applicant was required to prepay the expenses as a condition of the issuance of the permit. *Id.*

Pursuant to this ordinance, the city determined that 18 additional officers would be needed to police the nuclear freeze march and three additional officers would be needed to police the group's rally. *Id.* The city based its decision on a number of factors including its belief that due to the controversial nature of the rally and the location of a large defense contractor, the potential for hostile counter activity existed which

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necessitated the need for additional police protection. *Id.* The city's decision was also based on the expectation that the rally and parade would draw many non-local participants who, based on past police experience, the city concluded would be more likely to cause disorder than would local residents. *Id.* The cost of the additional police protection totaled \$1,435.71 (\$1,202.64 to compensate police working the parade and \$233.10 for the rally.) *Id.* This amount was computed on the basis of what it would cost to pay police officers to work off duty at time and one half pay. *Id.*

In finding the Orlando ordinance unconstitutional, the court stated:

The right of free speech, exercised in a public forum, on issues of public concern, cannot be abridged by governmental regulation which requires the speakers to prepay the costs of police protection, based on the content of the speaker's views.

Central Florida Nuclear Freeze Campaign, *Id.* at 1524. The court further ruled that the city's use of active off duty police officers and charging the sponsor overtime for those officers was not the least restrictive means available to the city of achieving its governmental objective of controlling traffic on public streets and protecting the public safety. *Id.* at 1526. The court suggested that the city could have used reserve police officers who are not entitled to contractual overtime pay as a less restrictive means of achieving its objective. *Id.* at 1526.

In Kansas City, Missouri, the city changed its policy from providing free police services to requiring payment for police for certain parades and not for others, based on the city's ability to respond to emergency calls during such events. The city alleged that it did not have adequate police personnel to maintain emergency call responses and other necessary police functions and still provide on-duty police officers for parades and processions. Gay and Lesbian Services Network v. Bishop, 823 F. Supp. 270, 275 (1993). The city thereafter instituted a new policy whereby the police department would provide free on-duty police coverage for only five (5) parades, those which draw participants from a large segment of the community, and also attract a large number of spectators. *Id.* at 272. The city claimed that the change from providing totally free policing to all events resulted from the "recent proliferation of parades and the [police] Department's lack of adequate personnel to supervise each while providing its numerous other services to the city." *Id.*

Plaintiff, an organization providing support and other services for its constituents in the gay and lesbian community in the Kansas City metropolitan area, had held parades in the two consecutive years preceding

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the change of city policy. When Plaintiff applied for a parade permit after the city policy was changed, Plaintiff was assessed a fee of \$496 for the cost of hiring eight off-duty officers and one off-duty supervisor to police the parade. *Id.* at 272. Plaintiffs then challenged the constitutional validity of the city's new policy. *Id.* In holding the policy unconstitutional, the court found that in determining the fee, the city considered the crowd size, and in determining the crowd size, the city considered the content of the parade sponsor's message. The court thus found that such a policy, which constituted a content-based restriction on free speech, was subject to strict scrutiny analysis. *Id.* at 275. Under such an analysis, the city's inability to pay for all the police services at all of the events was found not to rise to the level sufficient to justify a content-based permit fee system. *Id.*

While not ruling on the issue of the police department providing on-duty police officers for a variety of other events, the court found it "inconsistent" that the police department continues to do so, while citing poverty as a justification for the current policy. *Id.* at 275-276. The other events at which the on-duty police services were provided included Chiefs and Royals games.

In the wake of two significant civil rights demonstrations and marches which cost the county over \$670,000 in police protection, the Forsyth County Board of Commissioners enacted an ordinance providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes. Forsyth County, Georgia v. the Nationalist Movement, 505 U.S. 123, 126 (1992). The board of commissioners justified the ordinance by explaining that "the cost of necessary and reasonable protection of persons participating in or observing said parades, assemblies, demonstrations, road closings and other related activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible." *Id.* The ordinance, which initially required the permit applicant to pay a fee to be fixed by the board, was later amended to provide that permit applicants must pay a fee in advance of the issuance of the permit. The ordinance further provided that the fee would be no more than \$1,000.00 for each day the event took place. *Id.* In addition, under the ordinance, the county administrator was empowered to "adjust the amount to be paid in order to meet the expense incident to the administration of the ordinance and to the maintenance of public order." *Id.* at 126-127. In this case, the administrator based the fee on his own judgment of what would be reasonable. *Id.* at 132.

In finding the Forsyth County ordinance unconstitutional, the Court found no narrowly drawn, reasonable and definite standards to guide the county

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administrator in the county's implementation and construction of the ordinance. As no articulated standards existed in either the ordinance or the county's policy, the administrator was not required to rely on any objective factors, nor was he required to provide an explanation for his decision. *Id.* at 132-133. In the Court's view, the policy (or lack thereof) left open the possibility of the county administrator encouraging some views and discouraging others through the arbitrary application of fees. *Id.* at 133.

RECOMMENDATION

Under the cases discussed above, it is clear that a municipality may charge a fee to an event sponsor for providing police services. It is equally clear that such a policy may not be content-based, nor enforced in a discriminatory manner, nor give a government official unbridled discretion in determining fees to be charged. In formulating a policy or ordinance amendment, the City must keep these principles in mind.

If the Department wishes to amend the parade and/or block event ordinances, we recommend that as a condition of receiving a permit (parade or block event), the sponsor be required to present a security services plan to the police department, for review and approval by the Department prior to issuance of the permit. The ordinance should state objective criteria along the line of the criteria used in the Stonewall Union case. The Department could also set a fee schedule to be applied to all applicants uniformly.

cc: James Moncur
Michael Norton